

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARFIELD LAWSON,

Defendant-Appellant.

UNPUBLISHED

April 20, 2001

No. 220406

Saginaw Circuit Court

LC No. 97-014627-FC

Before: Cavanagh, P.J., and Markey and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assaulting a jail employee, MCL 750.197c; MSA 28.394(3), disarming a peace officer, MCL 750.479b(2); MSA 28.747(2), armed robbery, MCL 750.529; MSA 28.797, assault with intent to commit murder, MCL 750.83; MSA 28.278, receiving and concealing a stolen firearm, MCL 750.535b(1); MSA 28.803(2)(1), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant appeals as of right. We affirm.

Defendant first challenges the trial court's decision to admit evidence of defendant's subsequent assault of jail employees and attempted escape that occurred on April 3, 1999, more than two years after the instant offenses. Defendant contends the evidence was improperly admitted because it was remote in time and because the prosecutor did not demonstrate its logical relevance to an issue at trial. We disagree.

We review a trial court's evidentiary decision for an abuse of discretion. *People v Schutte*, 240 Mich App 713, 715; 613 NW2d 370 (2000). An abuse of discretion is found when, an unprejudiced person, considering the facts on which the decision was made, would conclude that there was no justification or excuse for the ruling made. *Id.* A trial court's decision on a close evidentiary question is ordinarily not an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998).

The admission of other acts evidence is governed by MRE 404(b)(1), which provides in pertinent part:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may,

however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

MRE 404(b) is a rule of inclusion, not exclusion. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998). Our Supreme Court has observed that underlying MRE 404(b) is “the fear that a jury will convict the defendant inferentially on the basis of his bad character rather than because he is guilty beyond a reasonable doubt of the crime charged.” *People v Crawford*, 458 Mich 376, 384; 582 NW2d 785 (1998). To avoid this danger, the Supreme Court has set forth a four-prong test for trial courts to follow when determining the admissibility of other acts evidence:

First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104 (b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury. [*People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994) (footnote omitted); see also *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000).]

In this case, the other acts evidence was properly admitted because it was probative of defendant’s specific intent and knowledge when he committed the charged acts. The prosecution charged defendant with six different counts, the majority of which required proof of a specific intent. For example, to prove the offense of assault of a jail employee, MCL 750.197c; MSA 28.394(3), the prosecution had to prove that defendant assaulted the victim *knowing* the victim to be a jail employee. See *People v Hurse*, 152 Mich App 811, 815; 394 NW2d 119 (1986). The prosecution was further required to demonstrate that defendant actually intended to assault that jail employee. *Id.* Furthermore, both armed robbery and assault with intent to commit murder are specific intent crimes. See *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999); *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995).

In addition, MCL 750.479b(2), MSA 28.747(2), punishes an individual who:

[T]akes a firearm from the lawful possession of a peace officer . . . if all of the following circumstances exist at the time the firearm is taken:

(a) [t]he individual *knows or has reason to believe* the person from whom the firearm is taken is a peace officer or a corrections officer.

(b) [t]he peace officer or corrections officer is performing his or her duties as a peace officer or a corrections officer.

(c) [t]he individual takes the firearm without the consent of the peace officer or corrections officer.

(d) [t]he peace officer or corrections officer is authorized by his or her employer to carry the firearm in the line of duty. [Emphasis supplied.]

Consequently, whether defendant possessed the requisite intent to assault a jail employee, and whether he knew the individual he disarmed was a peace officer were contested issues at trial. The prosecution was required to show not only that defendant intended to rob and kill the deputy, but that he assaulted and disarmed the deputy fully aware of his status as a peace officer and jail employee. Defendant further placed his intent and knowledge at issue by advancing an amnesia defense. The evidence relating to defendant's subsequent acts, although remote in time, tended to refute defendant's allegations that he was unaware he was assaulting, robbing and disarming a peace officer. Although we acknowledge that this evidence had the potential of prejudicing defendant, the tendency of the evidence to prove that defendant knowingly committed the charged crimes outweighed this risk, especially in light of defendant's purported claim of amnesia. Moreover, the jury received an appropriate limiting instruction. See *People v Gibson*, 219 Mich App 530, 534; 557 NW2d 141 (1996). Therefore, we are not convinced that the trial court abused its discretion in admitting this evidence.

Contrary to defendant's assertion on appeal, the fact that the other acts evidence occurred subsequent to the charged conduct does not automatically render it inadmissible. As this Court observed in *People v Puroll*, 195 Mich App 170, 171; 489 NW2d 159 (1992), MRE 404(b) specifically allows the admission of evidence of *subsequent* acts.

Defendant next argues that he was denied the effective assistance of counsel. Specifically, defendant contends that trial counsel failed to ensure that reports evaluating defendant's mental competency for trial also addressed the issue of diminished capacity. We disagree. Because defendant did not move for a new trial or a *Ginther*¹ hearing, this Court's review is limited to errors that are apparent from the record. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999).

To demonstrate ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that he suffered prejudice as a result. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). To satisfy the requirement of prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, he would not have been convicted. *Henry, supra* at 146. Effective assistance of counsel is presumed, and defendant bears the burden of proving otherwise. *Id.*

Defendant has failed to demonstrate that counsel's performance fell below an objective standard of reasonableness. Rather, our review of the record reveals that counsel took steps to ensure that the issue of diminished capacity was investigated. Moreover, the reports prepared by the examining psychologists adequately addressed the issue. The mere fact that the trial court subsequently denied defendant's request for an instruction on diminished capacity does not render counsel's assistance ineffective, especially because the record evidence did not support such an instruction.

¹ *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973).

Finally, defendant claims the trial court erred by failing to strike from the presentence investigation report information it deemed irrelevant to its imposition of sentence. We agree.

At sentencing, defense counsel challenged portions of the presentence report as irrelevant. Specifically, defense counsel argued that references to the charges of assault with intent to do great bodily harm, assault and battery and possession of a narcotic under twenty-five grams should be stricken because they were *nol-prossed* by the prosecutor. Defense counsel also made reference to charges of carrying a concealed weapon, receiving and concealing stolen property, prowling and loitering and frequent gambling, arguing they were irrelevant because they were dismissed by the prosecutor. In response, the trial court indicated that it would not consider these “superfluous” charges, but that they would remain in the presentence report.

Defendant argues that these charges should have been stricken from the presentence report to prevent irrelevant information from being transmitted to the Department of Corrections. Defendant does not contend that the trial court considered inaccurate information when imposing sentence. Rather, he argues that he is entitled to the preparation of an accurate presentence report.

MCL 771.14(6); MSA 28.1144(6) provides:

At the time of sentencing, either party may challenge, on the record, the accuracy or relevancy of any information contained in the presentence investigation report. The court may order an adjournment to permit the parties to prepare a challenge or a response to a challenge. *If the court finds on the record that the challenged information is inaccurate or irrelevant, that finding shall be made a part of the record, the presentence investigation report shall be amended, and the inaccurate or irrelevant information shall be stricken accordingly before the report is transmitted to the department of corrections.* [Emphasis supplied.]

The purpose of the statutory rule requiring that irrelevant information not considered by the sentencing court be stricken from the presentence report is not only to ensure that defendant is sentenced based on accurate information, but also to prevent the Department of Corrections from receiving false information. See *People v Taylor*, 146 Mich App 203, 205-206; 380 NW2d 47 (1985). Because the trial court expressly stated that the charges had no bearing on its imposition of sentence, the challenged portions should have been stricken from the presentence report. *Id.*; MCL 771.14(6); MSA 28.1144(6). Consequently, we remand for correction of the presentence report. See *People v Dilling*, 222 Mich App 44, 53-54; 564 NW2d 56 (1997).

We affirm defendant’s convictions, but remand for entry of a corrected presentence investigation report. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Jane E. Markey
/s/ Jeffrey G. Collins